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Rethinking Civil Liberties under the Washington State Constitution

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RETHINKING CIVIL LIBERTIES UNDER THE WASHINGTON STATE CONSTITUTION

Abstract: In 1986 the Washington Supreme Court set forth six criteria for courts to apply in determining whether the state constitution affords broader protection for civil liberties than the federal Constitution. While making progress toward an independent interpretation of the state constitution, Washington courts remain overly dependent on federal precedent. This Comment explores Washington's approach to independent analysis of the state constitution by examining a recent Washington case extending a privacy interest to an individual's garbage. Washington's approach needs to be modified to emphasize independent analysis of the state constitution and thereby give effect to Washington's unique and vital constitutional heritage.

When should a Washington state court deviate from federal constitutional precedent and independently interpret similar provisions in the state constitution? In our federal system, state courts have the right to offer greater civil liberties protection under state constitutions than under the federal Constitution.[1] Recently, for example, the Washington State Supreme Court departed from the United States Supreme Court's interpretation of fourth amendment search and seizure rights. The Washington Supreme Court in *State v. Boland*[2] found a state constitutional right to privacy in a person's garbage, although the United States Supreme Court had held under the federal Constitution that the fourth amendment does not prohibit search and seizure of a person's garbage.[3]

This Comment examines the current status of independent state constitutional analysis in Washington, focusing on the growth and expansion of state constitutional law protecting privacy interests with respect to search and seizure. This overview will demonstrate that undue reliance on the federal Constitution and on federal precedent has hampered development of Washington state constitutional protections. This Comment suggests that Washington courts should exercise care to keep the role of the federal Constitution in perspective and should concentrate more on Washington's own unique and vital constitution. This policy will better protect the civil liberties due Washington citizens.

1. *See infra* notes 32–35 and accompanying text.
2. 115 Wash. 2d 571, 800 P.2d 1112 (1990).
3. California v. Greenwood, 486 U.S. 35, 37 (1988).

I. THE WASHINGTON STATE CONSTITUTION

A. Significant Differences Between the State Constitution and the Federal Constitution

Structural, textual, and historical differences distinguish the federal Constitution and the Constitution of the State of Washington[4]. Examination of these differences reveals that in several areas the Washington State Constitution provides greater protection for civil liberties. Further, elements of the state constitution direct attention not to the federal Constitution for protection of civil liberties, but to rights as embodied in the Washington State Constitution.

1. Structural Differences

The Washington State Constitution independently provides protection for civil liberties and emphasizes these individual liberties structurally. The state constitution begins with a "Declaration of Rights," which asserts at the outset that governments "are established to protect and maintain individual rights."[5] Following this statement regarding the importance of individual liberty, the Declaration sets forth rights analogous to those in the federal Bill of Rights as well as additional rights not included in the federal Constitution.[6] Finally, article I, section 32 of the Washington State Constitution reiterates the natural rights embodied in the Washington Declaration of Rights by noting that "a recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government."[7]

In contrast, the federal Constitution focuses on the structural framework of government and includes individual rights in amendments.[8] Arguably, the structure of government was of primary concern when the federal Constitution was written in the 18th century, but individual rights dominated in 1889 when the Washington State Constitution was drafted. The decision of the Washington State Constitution authors to begin their document with a clarification of rights

4. This Comment uses the terms "Washington State Constitution" and "state constitution" to refer to the Constitution of the State of Washington.

5. WASH. CONST. art. I, § 1.

6. *See* WASH. CONST. art. I, §§ 1–34; *see also infra* notes 23–26 and accompanying text.

7. WASH. CONST. art. I, § 32. *See infra* note 111 and accompanying text.

8. Except for a few liberties enumerated in the text of the federal Constitution such as the contracts clause ("No state shall [pass] any [law] impairing the Obligation of Contracts" U.S. CONST. art. I, § 10, cl. 1.), individual liberties are set fourth in the Bill of Rights. U.S. CONST., amends. 1–10.

retained by the people suggests the supreme importance the authors attached to the Declaration of Rights.[9]

Several sections of the Washington State Constitution require the state to provide for certain fundamental needs.[10] For instance, article IX compels the state to furnish education for all children.[11] Similarly, article XIII states that reform facilities and services for the disabled "shall be fostered and supported by the state."[12] The federal Constitution contains no such mandates. In fact, the United States Supreme Court recently found no federal constitutional obligation whatsoever for states to act affirmatively in order to protect constitutional rights.[13] Instead, Congress and the states have the duty to ensure through legislation that rights enumerated in the federal Constitution are protected.[14] The role of the state constitution in Washington, however, is not only to guarantee basic rights, but to ensure that the state affirmatively acts to provide for basic societal needs such as education. Providing for such needs fosters protection of civil liberties.[15] Structurally, therefore, the Washington State Constitution emphasizes protection of individual liberties to a greater extent than does the federal Constitution.

2. *Textual Differences*

Textual differences also distinguish the state and federal constitutions. For example, the counterpart to federal fourth amendment rights is found in article I, section 7 of the Washington State Constitution.[16] Although analogous to the federal guarantee, the state provision uses strikingly different language. Whereas the fourth

9. WASH. CONST. art. I.

10. The term "needs" as used in this Comment is distinct from "rights" only in that services such as education can be viewed as vital services rather than as natural rights. However, the distinction is lost where compelled by a constitution; both become entitlements guaranteed by the state.

11. WASH. CONST. art. IX, § 1. ("It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.")

12. WASH. CONST. art. XIII, § 1.

13. *See* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989) (no constitutional obligation for a county social worker to affirmatively protect a child for whom the county had assumed responsibility). *But see* Plyler v. Doe, 457 U.S. 202 (1982) (the federal Constitution may require a state to provide benefits in order to provide equal protection of the laws).

14. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 648 (1966) (Congress may act to provide remedies for potential violations of the Constitution).

15. *See infra* text accompanying note 106.

16. WASH. CONST. art. I, § 7. Free speech provisions under WASH. CONST. art. I, § 5 are also distinct. *See infra* note 22.

amendment provides for protection from unreasonable search and seizure,[17] the Washington State Constitution speaks of a person's "private affairs."[18] The Washington Supreme Court recognizes that this is not a superficial difference. The federal test for protection under the fourth amendment turns on whether a "reasonable expectation of privacy" exists,[19] but in Washington the focus is on unreasonable intrusion into a person's "private affairs."[20] Courts interpret the state provision to provide broader protection than that afforded by the federal Constitution.[21]

Privacy protections are not the sole textual difference between the two constitutions.[22] In addition to providing broader protection in parallel provisions, the Washington Declaration of Rights contains provisions not specifically found in the federal Constitution. For example, the Washington State Constitution forbids imprisonment for debt,[23] explicitly makes military power subordinate to civil authority,[24] provides for free elections,[25] and allows individuals the right to bear arms in order to protect themselves as well as to protect the state.[26] These provisions of the state constitution are mandatory,[27] indicating that the liberties guaranteed in Washington's Declaration of Rights are broader than those protected by the Bill of Rights.

3. *Differences in Framers' Intent*

The fact that a given provision is textually distinct does not ensure that it is substantively different. For instance, a state court may inter-

17. U.S. CONST. amend. IV.

18. "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7.

19. The "reasonable expectation" test is attributed to Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

20. State v. Boland, 115 Wash. 2d 571, 575, 800 P.2d 1112, 1114 (1990).

21. *See, e.g.*, State v. Chrisman, 100 Wash. 2d 814, 676 P.2d 419 (1984); State v. White, 97 Wash. 2d 92, 640 P.2d 1061 (1982); State v. Simpson, 95 Wash. 2d 170, 622 P.2d 1199 (1980).

22. The free speech guarantee of the Washington State Constitution is also textually distinct: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." WASH. CONST. art. I, § 5. The Washington Supreme Court "construed this state's constitutional free speech provision to afford greater protection of individual liberties than its federal counterpart." Southcenter Joint Venture v. National Democratic Policy Comm., 113 Wash. 2d 413, 421, 780 P.2d 1282, 1286 (1989) (citing O'Day v. King County, 109 Wash. 2d 796, 802, 749 P.2d 142 (1988); Bering v. Share, 106 Wash. 2d 212, 234, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050, (1987); State v. Coe, 101 Wash. 2d 364, 679 P.2d 353 (1984)).

23. WASH. CONST. art. I, § 17.

24. WASH. CONST. art. I, § 18. Admittedly, this is implicit in the federal Constitution.

25. WASH. CONST. art. I, § 19.

26. WASH. CONST. art. I, § 24.

27. WASH. CONST. art. I, § 29.

pret language differing from the federal Constitution as providing protection equal to the federal Constitution.[28] In Washington, however, historical evidence suggests that the framers purposely chose distinct wording to protect against intrusion on individual rights to a greater extent than provided by the federal Constitution.[29] An early draft of Washington's free speech clause resembled the federal version, but the framers rejected it in order to expand free speech in Washington.[30] Similarly, the framers rejected a preliminary version of section 7 identical to the fourth amendment in favor of the broader current wording.[31] These examples demonstrate the intent of the framers of the Washington State Constitution to protect individual liberties with the state document.

B. The Role of the Washington State Constitution Under American Federalism

Federalism allows Washington state courts to interpret the state constitution as protecting civil liberties beyond the level of federal constitutional protection.[32] Interest in state constitutions as a source of protection for civil liberties began in earnest during the 1970s when the Burger Court instigated a period of federal civil rights retrenchment.[33] Justice Brennan was an early and vocal advocate of state constitutional analysis,[34] and the United States Supreme Court recognized that states can expand civil liberties beyond the federally guaranteed level.[35] Only three restrictions on independent state constitutional

28. The Washington Supreme Court has in fact interpreted Washington's free speech clause, article I, section 5, as conferring protection identical to the first amendment to the federal Constitution with respect to obscenity, even though the language differs considerably. State v. Reece, 110 Wash. 2d 766, 776, 757 P. 2d 947, 953 (1988).

29. *See, e.g.*, Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment*, 8 U. PUGET SOUND L. REV. 157, 178–80 (1985).

30. *Id.* at 172–77.

31. The Journal of the Washington Constitutional Convention, 1889 at 497 (B. Rosenow ed. 1962).

32. *See generally* Collins, *Foreward: Reliance on State Constitutions—Beyond the New Federalism*, 8 U. PUGET SOUND L. REV. vi, vi–viii (1985) (foreward to volume dedicated to symposium on Washington constitutional law).

33. *See, e.g.*, Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on State Constitutional Law*, 13 VT. L. REV. 13, 13–16 (1988).

34. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Justice Brennan wrote, "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." *Id.* at 491.

35. *See, e.g.*, Oregon v. Hass, 420 U.S. 714 (1975). Justice Blackmun, writing for the majority stated, "a State is free *as a matter of its own law* to impose greater restrictions on police activity

analysis exist. First, the degree of protection provided by a state constitution must not fall below the level guaranteed by the federal Constitution.[36] Second, a state court relying on the state constitution must indicate specifically that its decision is based on independent state grounds; if the state constitutional basis is not clearly and expressly identified, the United States Supreme Court can review and possibly overturn the decision as an erroneous interpretation of federal standards.[37] Finally, the state guarantee cannot intrude upon a separate federal constitutional right.[38]

C. *Washington's Approach to Independent State Constitutional Analysis:* State v. Gunwall

Washington's early advances into independent state constitutional analysis implicitly deferred to federal constitutional analysis.[39] In 1986, however, Washington's highest court attempted to add legal substance and direction to independent state constitutional analysis in *State v. Gunwall.*[40] The issue in *Gunwall* was whether the police could, without a warrant, obtain a record of local and long distance numbers dialed.[41] The United States Supreme Court previously held that such warrantless conduct was not a constitutional violation,[42] so analysis in *Gunwall* turned on whether such police action comported with the state constitution. The court set forth six "non-exclusive criteria"[43] to be applied when considering whether the Washington State Constitution extends broader protection than the federal Constitution: (1) the textual language; (2) differences in the texts; (3) constitutional

than those this Court holds to be necessary upon federal constitutional standards." *Id.* at 719 (emphasis in original).

36. *See, e.g.,* Michigan v. Long, 463 U.S. 1032, 1041–42 (1983); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980); Oregon v. Hass, 420 U.S. 714, 719 (1975).

37. *Michigan,* 463 U.S. at 1041.

38. For example, a state requirement to provide assistance to parochial schools would offend the federal establishment clause. *See* U.S. CONST. amend. I.

39. *See, e.g.,* Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 238, 635 P.2d 108, 113 (1981) ("Where controlling federal principles have not changed with the evolution of our society or where they have been recently overruled by the United States Supreme Court, our constitution has been applied.").

40. 106 Wash. 2d 54, 720 P.2d 808 (1986); *see also* Note, *Federalism, Uniformity and the State Constitution*—State v. Gunwall, *106 Wash. 2d 54, 720 P.2d 808 (1986),* 62 WASH. L. REV. 569 (1987).

41. State v. Gunwall, 106 Wash.2d 54, 58, 720 P.2d 808, 810–11 (1986).

42. Smith v. Maryland, 442 U.S. 735 (1979).

43. "Non-exclusive" in the sense that not all elements need be met in order to move beyond federal precedent, and other factors may be incorporated into the analysis.

history; (4) preexisting state law; (5) structural differences; (6) matters of particular state interest or local concern.[44]

The *Gunwall* decision intended to provide for independent analysis of the Washington State Constitution. Justice Andersen, writing for the majority, set forth two ambitious goals. First, the *Gunwall* court designed the six criteria to aid counsel in asserting constitutional grounds.[45] Second, the criteria were intended to ensure that state constitutional analysis would develop in a principled manner based on "well-founded legal reasons" rather than through ad hoc decisions where the court's opinion of justice differs from that of the United States Supreme Court.[46] In effect, the court intended constitutional analysis in Washington to be a two-stage process. First, if properly briefed, a court would apply the *Gunwall* criteria to determine if state protection extended beyond federal protection. Second, if state protection extended beyond the federal minimum, a court would examine the state constitution independently to determine its scope.

*D. Post-*Gunwall *Decisions*

The Washington Supreme Court applied the *Gunwall* criteria in *State v. Boland.*[47] In *Boland,* Port Townsend police obtained evidence of drug activity from the defendant's garbage without a warrant.[48] Because the United States Supreme Court found this type of warrantless intrusion constitutional in *California v. Greenwood,*[49] the issue in *Boland* turned on whether the Washington State Constitution afforded greater protection than the federal Constitution.

Application of the six *Gunwall* criteria indicated that the federal constitutional threshold was surpassed. The *Boland* court cited to and explicitly adopted the *Gunwall* court's analysis of criteria one, two, three, and five.[50] Regarding the fourth criterion, consideration of preexisting state law, the *Boland* court looked to local ordinances requiring placement of garbage cans in a closed container on the curb. These ordinances suggested that only garbage collectors would handle

44. *Gunwall,* 106 Wash. 2d at 58, 720 P.2d at 811.

45. *Id.* at 62, 720 P.2d at 813.

46. *Id.* at 62–63, 720 P.2d at 813. Admittedly, the court's approach could be termed conservative rather than ambitious in that it would deviate from federal precedent only when certain conditions were met. In theory, however, counsel would argue state constitutional law in each and every constitutional case.

47. 115 Wash. 2d 571, 800 P.2d 1112 (1990).

48. *Id.* at 573, 800 P.2d at 1113.

49. 486 U.S. 35 (1988).

50. *Boland,* 115 Wash. 2d at 576, 800 P.2d at 1114. *See supra* text accompanying note 44.

the trash, thus implying a privacy interest.[51] Turning to the sixth criterion, matters of local interest, the *Boland* court noted that because *Greenwood* authorized a broader interpretation under state constitutions,[52] and because other states had found a state constitutional right to privacy,[53] Washington was entitled to do the same.[54] The dissent in Boland objected to the majority's analysis of factors four and six, arguing that the analysis was neither reasoned nor reasonable.[55] To be sure, the majority's findings on the fourth and sixth criteria did not provide a strong argument in favor of independently invoking the state constitution.[56]

The *Boland* court nonetheless concluded that the Washington State Constitution could provide broader protection than the federal Constitution, and it next turned to independent analysis of the state constitution. The court first noted that analysis of protections afforded by article 1, section 7 hinged on the state's intrusion into a person's "private affairs" rather than on the federal "reasonable expectation of privacy" test.[57] The *Boland* court began to forge a definition of "private affairs" by exploring earlier efforts to define what constitutes an unconstitutional intrusion on a person's private affairs.[58] Rather than looking to the intrusion on the defendant's private affairs that occurred when the police picked through defendant's garbage, however, the court stated that "average persons would find it reasonable to believe the garbage they place in their trash cans will be protected from warrantless governmental intrusion."[59] The court thus retreated from its own mission to interpret police conduct under state law and instead relied on the federal "reasonable expectation of privacy" standard. The court nonetheless concluded that the search fell within the definition of a "private affair,"[60] and was illegal under the state constitution.

51. *Boland,* 115 Wash. 2d at 576, 800 P.2d at 1114–15.

52. California v. Greenwood, 486 U.S. 35, 43 (1988).

53. *Boland,* 115 Wash. 2d at 576–77, 800 P.2d at 1115 (citing People v. Krivda, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), *vacated and remanded,* 409 U.S. 33 (1972), *reaff'd,* 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521, *cert. denied,* 412 U.S. 919 (1973); State v. Tanaka, 67 Haw. 658, 701 P.2d 1274 (1985); Smith v. State, 510 P.2d 793 (Alaska 1973)).

54. *Boland,* 115 Wash. 2d at 577, 800 P.2d at 1115.

55. *Id.* at 587, 800 P.2d at 1120 (Guy, J., dissenting).

56. *See infra* notes 93–97 and accompanying text.

57. *Boland,* 115 Wash. 2d at 577, 800 P.2d at 1115.

58. *Id.* at 577–78, 800 P.2d at 1115–16.

59. *Id.* at 578, 800 P.2d at 1116.

60. *Id.*

Boland is one of very few opinions that have cited and adopted the *Gunwall* criteria.[61] Despite the clear directions set forth in *Gunwall,* use of the six criteria has been neither consistent nor common since the case was published in 1986. Failure of counsel to brief the issues according to the *Gunwall* criteria is the main explanation.[62] Without briefing on *Gunwall,* the Washington Supreme Court appears unwilling to apply the approach outlined in *Gunwall.*[63]

In some constitutional cases the Washington Supreme Court appears to extend protection beyond the federal level, yet fails to apply the *Gunwall* criteria.[64] An example is *State v. Leach,*[65] a search and seizure case in which the Washington Supreme Court looked to state constitutional law to conclude that third party consent is not valid when persons being searched are not given the chance to indicate opposition to a search despite their immediate presence.[66] No federal case was directly on point, indicating that one reason the *Gunwall* criteria were not applied was that the Washington Supreme Court will not compare federal and state constitutional limits without direct federal precedent to the contrary.[67]

II. PROPOSAL TO MODIFY THE *GUNWALL* APPROACH

A change is needed in Washington constitutional law. As this overview of constitutional interpretation since *Gunwall* indicates, the *Gunwall* criteria have not been consistently applied[68] and have not

61. Another case is State v. Reece, 110 Wash. 2d 766, 757 P.2d 947 (1989), which held that the Washington State Constitution did not grant protection to obscenity. Throughout the remainder of this Comment, reference will be made to *Reece* in order to demonstrate that *Boland* is not an aberration, but rather typical of the problems engendered by *Gunwall.*

62. The Washington Supreme Court continues to demand that the criteria be cited and argued. *See, e.g.,* City of Seattle v. Webster, 115 Wash. 2d 635, 646 n.19, 802 P.2d 1333, 1340 (1990) (the court chided counsel for failure to use the *Gunwall* analysis).

63. *See, e.g.,* Ford Motor Co. v. Barret, 115 Wash. 2d 556, 800 P.2d 367 (1990). Justice Utter, long an advocate of invoking the state constitution, nevertheless refused to independently invoke the state constitution because it was not briefed and argued at the trial court level: "Trial courts should have the same opportunity as this court to make fully informed rulings on state constitutional law issues." *Id.* at 571, 800 P.2d at 375 (Utter, J., concurring).

64. Failing to cite *Gunwall* without explanation leaves a majority opinion open to attack. *See, e.g.,* Sofie v. Fibreboard Corp., 112 Wash. 2d 636, 771 P.2d 711 (1989) (in dissent to a holding that article I, section 21 preserves the jury's role in determining damages, Justice Durham accused the court of extending constitutional protection beyond that afforded by the federal Constitution without relying on *Gunwall* and without providing a reason for doing so).

65. 113 Wash. 2d 735, 782 P.2d 1035 (1989).

66. *Id.* at 744, 782 P.2d at 1040.

67. Of course, counsel in *Leach* may simply have failed to argue "broader" rights under the state constitution and instead relied solely on state precedent and state constitutional arguments in briefs.

68. *See supra* notes 61–67 and accompanying text.

promoted principled expansion of independent state constitutional analysis.[69] The goals of *Gunwall* have thus not been met, and therefore the *Gunwall* framework needs to be modified. This Comment now examines the failure of *Gunwall* by analyzing cases in which state constitutional issues were asserted, and then proposes a better method of state constitutional analysis that will guarantee the civil liberties due under the Washington State Constitution.

A. The Gunwall *Criteria Do Not Offer a Proper Framework for Constitutional Analysis*

The six criteria outlined in *Gunwall*[70] are a curious mix of interpretive and comparative factors that fail to comprise a proper framework for constitutional analysis. Normally, the tools a court uses to construe a constitutional issue include plain language (analogous to *Gunwall* criteria one and two), framers' intent (analogous to criterion three), precedent (analogous to criterion four), structural differences (analogous to criterion five), and moral concerns (analogous to criterion six).[71]

Although the *Gunwall* criteria contain all the usual interpretive tools, only text and structure are viewed comparatively.[72] Therefore, when a Washington court addresses the threshold question whether the state constitution affords broader rights than the federal Constitution, it compares only text and structure under *Gunwall.* Consideration of intent, precedent, and values is directed only to the state constitution. This does not allow a full comparison of all issues. When a court views local concerns and values without comparison to the federal framework, the concerns may be discounted as minor, or alternately may be exaggerated.[73] Intent may similarly be discounted or conversely inflated when not put in perspective with the intent of the framers of the United States Constitution.

The *Gunwall* framework allows a party to assert rights under the state constitution independently only if application of the six criteria suggests a broader scope of rights under the state constitution.[74] This threshold at which the state constitution may be invoked indepen-

69. *See supra* notes 47–60 and accompanying text.

70. State v. Gunwall, 106 Wash. 2d 54, 58, 720 P.2d 808, 811 (1986). *See supra* text accompanying note 44.

71. *See* Fallon, *A Constructivist Coherence Theory to Constitutional Interpretation,* 100 HARV. L. REV. 1189 at 1189–90 (1987).

72. *Gunwall,* 106 Wash. 2d at 61–62, 720 P.2d at 812–13.

73. *See infra* text accompanying notes 93–97.

74. *See supra* text accompanying notes 44–46.

dently, however, is subject to manipulation.[75] To determine if the scope of protection is greater under the state constitution, a court should compare plain language, framers' intent, precedent, structure, and moral values with respect to *both* constitutions. Under *Gunwall,* however, only text and structure are compared. Thus, the goal of *Gunwall* to provide a framework under which to compare state and federal rights is thwarted from the very start.

Further, use of the criteria is patently haphazard. By requiring a threshold showing that broader rights are afforded under the state constitution, *Gunwall* assumes from the outset that the Washington State Constitution is analogous in all respects to the federal Constitution as interpreted by the United States Supreme Court. Only if this presumption is rebutted will the Washington Supreme Court independently rely on the state constitution. Such deference to the federal Constitution is not required under principles of federalism[76] and compromises the fundamental integrity of the state constitution. The process of initially assessing analogous protections is haphazard in that if an issue arises in Washington state that has not been brought before the United States Supreme Court, Washington courts may analyze the issue solely under state constitutional law. Once the United States Supreme Court decides a case, however, Washington is implicitly bound by it unless the *Gunwall* criteria can be successfully invoked. The timing of United States Supreme Court cases should not dictate state constitutional law, yet this may occur under *Gunwall.*

An example will demonstrate the haphazard effect of *Gunwall.* In *State v. Leach*[77] the Washington Supreme Court relied on the state constitution to hold that third party consent to a police search is invalid when the person whose property is searched is not given the opportunity to object.[78] No federal case was directly on point, and the *Leach* court did not invoke *Gunwall.* Shortly after the case was decided, however, the United States Supreme Court addressed a similar set of facts in *Illinois v. Rodriguez*[79] and held directly to the contrary.

Leach is still good law because the Washington Supreme Court relied on state constitutional grounds. Had *Leach* arisen after *Rodriguez,* however, the court would have been bound by the United States Supreme Court's holding unless *Gunwall* was successfully invoked.

75. *See infra* notes 93–97 and accompanying text.
76. *See supra* text accompanying notes 32–38.
77. 113 Wash. 2d 735, 782 P.2d 1035 (1989)
78. *Id.* at 744, 782 P.2d at 1040.
79. 110 S. Ct. 2793 (1990).

Use of the *Gunwall* criteria is thus haphazard in that the timing of United States Supreme Court decisions can dictate Washington constitutional law.

B. *The* Gunwall *Goal of Promoting State Constitutional Analysis Has Failed Due to Primary Focus on the Federal Constitution*

The goals of *Gunwall* were to encourage counsel to brief state constitutional issues and to provide a basis for expansion of independent state constitutional analysis that would be principled rather than pragmatic.[80] This expansion never occurred,[81] and the cases applying *Gunwall* are not strong examples of principled decision making.[82] By directing attention to federal constitutional principles at the threshold stage of analysis, the Washington courts have become overly dependent on federal precedent. The criteria force courts to focus on federal constitutional provisions and interpretations, and to invoke state constitutional provisions only to the extent that they afford broader protection. The *Gunwall* criteria minimize the possibility that the state constitution might provide a different and perhaps unique approach to constitutional interpretation.

For instance, federal and state courts have struggled for years to define a "reasonable expectation of privacy" regarding unlawful search and seizures. The Oregon Supreme Court rejected the "reasonable expectation of privacy" mode of analysis, asserting that "[t]he phrase becomes a formula for expressing a conclusion rather than a starting point for analysis, masking the various substantive considerations that are the real bases on which the Fourth Amendment searches are defined." [83] Washington also rejected the "reasonable expectation of privacy" test[84] in favor of a different and more useful analytical framework. Prior to *Gunwall,* the Washington courts made great strides in defining search and seizure rights under the "unreasonable intrusion into a person's private affairs" standard.[85] Since *Gunwall,* however,

80. State v. Gunwall, 106 Wash. 2d 54, 62–63, 720 P.2d 808, 813 (1986). *See supra* text accompanying notes 45–46.

81. Even where *Gunwall* was applied and a broader scope of rights acknowledged, the Court failed to add substance to state constitutional interpretation. *See infra* text accompanying notes 86–91.

82. *See infra* text accompanying notes 93–97.

83. State v. Campbell, 306 Or. 157, 759 P.2d 1040, 1044 (1988).

84. *See, e.g.,* State v. Myrick, 102 Wash. 2d 506, 510, 688 P.2d 151, 153–54 (1984).

85. *See, e.g.,* Nock, *Seizing Opportunity, Searching for Theory: Article I, Section 7,* 8 U. PUGET SOUND L. REV. 331 (1985) (article traces the development of Washington courts' interpretation of article I, section 7).

courts have made little progress in advancing this standard because once a court views the state constitution in the shadow of the federal Constitution, it is difficult to view the state constitution with a fresh perspective.

Boland is a prime example of this tendency. Even though the initial threshold was surpassed and the court independently invoked the Washington State Constitution, federal rationales invaded the Washington Supreme Court's reasoning.[86] Numerous cases prior to *Gunwall* contributed to the definition of "private affairs,"[87] and the Court recognized that the proper inquiry in Washington focuses on unreasonable intrusion into a person's "private affairs."[88] Yet the court concluded that an intrusion into a person's private affairs occurred because "average persons would find it reasonable to believe the garbage they place in their trash cans will be protected from warrantless government intrusion."[89] The court in the same breath rejected the expectation of privacy test as counter to Washington law, and then again embraced it.[90] Such inconsistencies result from *Gunwall* because once attention focuses on federal precedent and terminology, courts find it hard to turn back to state law and invoke independent, creative analysis of state constitutional provisions.[91]

As a practical matter, the federal Constitution need only be examined after analysis of the state constitution to ensure that the minimum level of federal constitutional rights is sustained.[92] Of course, federal precedent serves as persuasive authority in many instances and reference to federal authority reveals substantive differences between the constitutions. *Gunwall,* however, forces unneces-

86. *See supra* text accompanying notes 57–60.

87. *See* cases cited *supra* note 21.

88. State v. Boland, 115 Wash. 2d 571, 577, 800 P.2d 1112, 1115 (1990).

89. *Id.* at 578, 800 P.2d at 1116.

90. Emphasis on federal precedent also occurred in State v. Reece, 110 Wash. 2d 766, 757 P.2d 947 (1988). The *Reece* court turned its back on Article I, § 5 of the state constitution which provides for free speech on "all subjects" in favor of federal rationales: "We hold that if a publication meets the federal test as an obscenity, it may be banned under both the state and federal constitutions." *Id.* at 776, 757 P.2d at 953.

91. *But see* Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds,* 63 TEX. L. REV. 1027 (1989). Washington Supreme Court Justice Utter makes a convincing argument for the value of analyzing state constitutional issues parallel to federal law. To the extent that comparison is free from the implicit applicability of the federal constitution to Washington constitutional law, the opinion expressed in this Comment does not differ from Justice Utter's. Federal case law has value as persuasive authority and serves to delineate differences between state and federal constitutions. *Gunwall,* however, goes beyond this and proceeds from the assumption that the state and federal constitutions initially provide the same rights.

92. *See supra* note 35 and accompanying text.

sary and inadvisable emphasis on federal precedent, and this hampers the growth of Washington state constitutional law.

C. *Application of* Gunwall *in* Boland *Shows that the Criteria Can Serve as a Mask for Ad Hoc Decision Making*

Application of the six *Gunwall* criteria in *Boland* suggests that the criteria do not foster principled decision making. The *Boland* court's treatment of the *Gunwall* criteria constitutes a weak argument in favor of a broader scope of rights under the state constitution. First, the Washington Supreme Court seems to mix reasoning with result in its examination of matters of local interest. In support of the defendant's assertion of a privacy interest in garbage, the *Boland* court cited the results of other state court decisions that found a constitutional right to privacy in garbage,[93] but failed to articulate the basis upon which the other state courts reached that conclusion.[94] In effect, the *Boland* court's rationale is that because other states recognize a privacy interest in garbage, Washington can also. The *Boland* court fails to address how this supports a particularly local interest. The holding thus has the appearance of ad hoc decision making.

A second weakness of *Boland* attributable to reliance on *Gunwall* is the analysis of preexisting state law. The majority in *Boland* stressed the fact that both Port Townsend and Seattle have municipal ordinances regulating placement of garbage cans on the curb.[95] The court reasoned that this supports an expectation that only trash collectors will collect a person's trash, and accordingly a local interest existed sufficient to interpret the state constitution independently.[96] This conclusion is somewhat simplistic. Hypothetically, if Seattle or Port Townsend were to repeal or amend their municipal ordinances, would doubt be cast on the validity of the extension of constitutional protection to individuals' garbage? Perhaps the court is asserting that the average person's expectations are likely to be formed by such ordinances, but an assertion that reasonable persons are aware of trash codes and form their expectation of privacy based on these codes is not

93. State v. Boland, 115 Wash. 2d 571, 578, 800 P.2d 1112, 1116 (1990) (citing State v. Tanaka, 67 Haw. 658, 701 P.2d 1274 (1985)).

94. This did not go unnoticed by the dissent: "If we are to rely upon other states' treatment of this issue, then the overwhelming majority of courts have held to the contrary." *Boland*, 115 Wash. 2d at 586, 800 P.2d at 1120 (Guy, J., dissenting).

95. *Id.* at 576, 800 P.2d at 1114.

96. *Id.* at 576, 800 P.2d at 1115.

persuasive. Reliance on preexisting statutory law does not make a strong argument in favor of a constitutional privacy interest. [97]

A stronger argument in favor of extending constitutional protection to warrantless searches of garbage can be formulated based entirely on the Washington State Constitution. Other Washington cases, including cases noted by the *Boland* court, have defined privacy interests in a variety of contexts including a jail property box,[98] the locked trunk of a car,[99] a locked container in a private vehicle,[100] and a person's right not to be indiscriminately stopped at police roadblocks.[101] These examples suggest that a "private affairs" interest may be defined as a matter or object personal to an individual such that intruding upon it would offend a reasonable person.[102] This definition would arguably cover garbage placed on the curb for collection because discarded items such as cancelled checks, letters, and bills contain personal information an individual would likely intend to remain strictly personal. This definition would provide a workable framework from which to expand state constitutional analysis in future cases.

In short, the *Gunwall* criteria are not conducive to strong constitutional analysis. Manipulation is possible when the criteria are applied to the threshold issue of whether the state constitution extends broader protection. This manipulation typifies the type of analysis the *Gunwall* court intended to avoid.[103]

D. Toward True Independent Analysis of the Washington State Constitution

1. Reliance on Washington's Unique Constitutional Heritage

Washington state courts should rely on Washington's unique constitutional heritage. The *Gunwall* approach is a step toward independent

97. *Boland* is not the only instance of misplaced reliance on statutory law. In State v. Reece, 110 Wash. 2d 766, 757 P.2d 947 (1988), the dissent noted that "[t]he fundamental strength of the constitution is that it forces us, having declared basic principles, to apply those principles uniformly, even if such a result may not be popular in some instances and even where we must nullify a statute." *Id.* at 790, 757 P.2d at 960 (Utter, J., dissenting).

98. State v. Simpson, 95 Wash. 2d 170, 622 P.2d 1199 (1980).

99. State v. Houser, 95 Wash. 2d 143, 622 P.2d 1218 (1980).

100. State v. Stroud, 106 Wash. 2d 144, 720 P.2d 436 (1986).

101. State v. Mesiani, 110 Wash. 2d 454, 755 P.2d 775 (1988).

102. In State v. Myrick, 102 Wash. 2d 506, 688 P.2d 151 (1984), the court framed the issue as whether it was "unreasonably intrusive" for police to view defendant's property from the air. *Id.* at 514, 688 P.2d at 155.

103. *See* State v. Gunwall, 106 Wash. 2d 54, 58, 720 P.2d 808, 813 (1986). "Recourse to our state constitution as an independent source for recognizing and protecting the individual rights of our citizens must spring not from pure intuition, but from a process that is at once articulable, reasonable and reasoned." *Id.* at 63, 720 P.2d at 818.

state constitutional analysis because the criteria force attorneys and courts to consider the state constitution. For the reasons set forth above, however, *Gunwall* has done little to promote principled analysis of the Washington State Constitution. *Gunwall* requires a detour to the federal Constitution that obscures the fact that the Washington State Constitution is in itself a complete embodiment of civil liberties.[104]

The structure of the Washington State Constitution is unique.[105] The state government is compelled to provide for basic needs, giving Washington citizens "positive constitutional rights" to assert against the state when the state fails in its duty to supply education and other enumerated services.[106] Moreover, the state government must furnish educational benefits to all persons "without distinction or preference on account of race, color, caste, or sex."[107] Not only is equal protection guaranteed by the fourteenth amendment to the United States Constitution, but the Washington State Constitution also forces the state government to provide equal protection with respect to educational services. This suggests that the citizen-state relationship created by the Washington State Constitution is distinct from that of the federal Constitution. It follows that state government in Washington is subject to constitutional constraints absent at the federal level. Therefore, the state constitution should be examined independently in all "rights" cases to ascertain whether the state has met the state constitutional mandate.

As noted, historical evidence suggests that in several areas, the framers of the Washington State Constitution purposely chose wording that differed from the federal Constitution in order to protect a broader scope of civil rights.[108] Until recently, these differences went unnoticed,[109] and under *Gunwall* they remain undeveloped. Using intent as an analytic tool is criticized as protecting inflexibility and

104. WASH. CONST. art. I, §§ 1–32.

105. The Washington State Constitution is unique in comparison to the federal Constitution. Other state constitutions may have similar provisions.

106. *See, e.g.*, WASH. CONST. art. XIII (mandating provision of educational, reformatory, and penal institutions) and WASH. CONST. art. IX (mandating public schools).

107. WASH. CONST. art. IX, § 1.

108. The Journal of the Washington State Constitutional Convention, *supra* note 31 at 497.

109. *See, e.g.*, Nock, *Seizing Opportunity, Searching for Theory: Article I, Section 7*, 8 U. PUGET SOUND L. REV. 331 (1985). The author notes, in comparing the fourth amendment and article I, section 7 of the Washington State Constitution, that "[t]hese two passages have exactly five words in common: *no, be, in, or, of.* Yet, wondrously, courts have interpreted the provisions as identical in nearly all important respects, and the areas of divergence have had little to do with textual differences." *Id.* at 331.

societal ideals that are no longer valid,[110] but where the framers' intent was to broaden the civil liberties of Washington citizens, courts must not ignore this intent. The intent of the framers to use the state constitution to protect civil liberties beyond the level explicitly provided in the federal Constitution compels Washington state courts to examine the state constitution independently in all situations, not only when the threshold stage of *Gunwall* has been surpassed.

Additional protection of individual freedom in Washington results from inclusion of a clause in the state constitution encouraging a "recurrence to fundamental principles."[111] The federal Constitution contains no such provision, and the original intent of including this provision is not clear. One may suppose, however, that the principles the framers had in mind were the natural rights embodied in the previous thirty-one sections. Supporting this assertion is section 29, which makes the provisions of the state constitution mandatory. Section 32 does not direct attention to the federal Constitution or to some other source of rights, but rather to the fundamental principles embodied in the Washington State Constitution. For the Washington Supreme Court to look elsewhere defies the intent of the framers of the state constitution.

2. *Continued* Gunwall *Analysis Will Compromise the Civil Liberties Due Washington Residents*

Reliance on *Gunwall* compromises the civil liberties provided by the Washington State Constitution. Nothing compels state courts to begin constitutional analysis with the presumption that federal holdings bind them. Courts are bound to uphold only the minimum federal constitutional floor.[112] Yet *Gunwall* forces attention first and foremost to the

110. *See generally* Schlag, *Framers Intent: The Illegitimate Uses of History*, 8 U. PUGET SOUND L. REV. 283 (1985).

111. WASH. CONST. art. I, § 32. Little scholarship is available regarding the meaning of this section. It is cited chiefly in dissenting opinions. *See, e.g.*, State v. Reece, 110 Wash. 2d 766, 790, 757 P.2d 947, 960 (1988); State v. McCollum, 17 Wash. 2d 85, 136 P.2d 165 (1943), *rev'd sub nom*, State v. Ringer, 100 Wash. 2d 686, 674 P.2d 1240 (1983). In a particularly enlightening dissent, Justice Milland wrote:

> The founding fathers were aware of the ills to which a republican form of government is peculiarly heir. They were mindful of the fact that a free people too soon forget the fathers' sacrifices which made the heritage of liberty possible, and that, through the years as they prosper, the people grow more indifferent to and heedless of, the fundamental principles of government and fall an easy prey to the slow and insidious encroachment from within upon natural and constitutional rights.

McCollum, 17 Wash. 2d at 95, 136 P.2d at 169 (Milland, J., dissenting).

112. The Washington Supreme Court itself asserts the right to independently interpret its own constitution, yet curiously begins with federal constitutional analysis. *See, e.g., Reece*, 110

assumed applicability of the federal interpretation to Washington state law. This order of analysis threatens the broader civil liberties afforded under the Washington State Constitution. Civil liberties retrenchment at the federal level should not necessarily dictate Washington constitutional protections, but the *Gunwall* analysis promotes that result by forcing attention to the federal Constitution.

State courts are often viewed by the United States Supreme Court as laboratories for the development of legal issues.[113] The "states as laboratories" view took on new meaning when attention turned to state constitutions as separate and complete sources of civil rights. The United States Supreme Court has authorized state courts to go beyond the minimum floor provided by the federal Constitution[114] and may even be reserving judgment in some cases for the sole purpose of allowing states to decide issues based on state law.[115] For example, Justice Marshall, in a bitter dissent to a decision not to grant certiorari in a case where an all-white jury sentenced an African American to death after the prosecution used peremptory challenges to exclude black jurors, accused the majority of reticence in leaving to the states an issue that demanded attention.[116] If the United States Supreme Court is indeed leaving some issues to the states, the states should assume responsibility for resolving those issues under their own laws and own constitutions. To the extent that *Gunwall* focuses primary attention on federal constitutional law, the time is right to drop *Gunwall* and forge ahead with independent analysis of the Washington State Constitution.

3. *Modifying the* Gunwall *Analysis*

The *Gunwall* framework must be modified to promote principled decision making based on the Washington State Constitution. The *Gunwall* court expressed its desire to avoid substituting its conception of justice for that of the United States Supreme Court.[117] Hesitancy to

Wash. 2d at 770, 757 P.2d at 950 ("In beginning our analysis with federal law, we do not retreat from our general position that in resolving a constitutional law question we should turn first to the provisions of our own state constitution.") The *Reece* court nonetheless proceeds to discuss federal law before state law. *Id.* at 770–71, 757 P.2d at 950.

113. This metaphor was first used in New State Ice Co. v. Liebmann, 285 U.S. 262, 310–11 (1932).

114. *See, e.g.*, California v. Greenwood, 486 U.S. 35, 43 (1988).

115. Of course, such issues have been directed to state courts without specific reference to state constitutional law, but when United States Supreme Court opinions encourage states to evaluate civil rights issues under state law, the "states as laboratories" rationale encompasses state constitutional law.

116. Gilliard v. Mississippi, 464 U.S. 867 (1983).

117. State v. Gunwall, 106 Wash. 2d 54, 63, 720 P.2d 808, 813 (1986).

expand constitutional rights haphazardly is understandable. A state's highest court must strive to follow legal principles rather than fall prey to political or emotional forces, but political and emotional forces also batter the United States Supreme Court.[118] Following federal precedent will not in itself foster principled decision making. The solution is to discard the assumption that the state constitution should be interpreted as the United States Supreme Court interprets the federal Constitution, and focus instead on Washington's unique constitutional heritage.[119]

The framework of *Gunwall* should be modified in favor of a three-step process. First, constitutional issues, including textual, structural, and intent arguments should be asserted under the Washington State Constitution. Second, state constitutional and common law precedent should be considered, along with the persuasive authority of other state and federal courts. Finally, a court must ensure that its decision upholds the minimum level of civil liberties ensured by the federal Constitution. This method of constitutional interpretation would help attain the goals of *Gunwall*. It would direct counsel to cite the state constitution with comparative reference to the federal Constitution, and development of state constitutional law would occur in a principled manner.

III. CONCLUSION

Despite the laudable intent of the Washington Supreme Court to interpret the state constitution in a principled manner, little growth in state constitutional law has occurred in the years since the *Gunwall* decision. This lack of growth is due to the analytical framework established by *Gunwall*. Focus on federal constitutional law at the initial stage as required by *Gunwall* taints a court's perspective with federal analysis, and Washington's unique and vital constitutional heritage becomes obscured. Further, application of the six *Gunwall* criteria forces courts to twist their reasoning to conform to a preconceived notion. The weakness of the *Boland* holding is merely one example. In order to realize the goals of *Gunwall*, its structure must be aban-

118. *See, e.g.*, DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 213 (1989) ("It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about 'liberty and justice for all—'that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.") (Blackmun, J., dissenting).

119. Those who fear that departure from federal precedent will cause an explosion of civil rights at the expense of police protection should read Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19 (1989).

doned and courts' attention must be directed first and foremost to the state constitution. Federal precedent has a role as persuasive authority, but it need not and should not dominate Washington courts' analysis. Increased attention on Washington's unique constitutional heritage will guarantee the civil liberties due to Washington citizens under their state constitution.

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